

## **SUBCHAPTER E : FINANCIAL RESPONSIBILITY**

### **§334.91. Applicability.**

(a) This subchapter applies to owners and operators of all petroleum UST systems except as otherwise provided in this section.

(b) Owners and operators of petroleum UST systems are subject to the requirements of this subchapter if they are in operation on or after the date for compliance established in §334.92 of this title (relating to Compliance Dates).

(c) State and federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of this subchapter.

(d) The requirements of this subchapter do not apply to owners and operators of any UST system described in §334.3 of this title (relating to Commission Exclusions) and §334.4 of this title (relating to Statutory Exemptions).

(e) If the owner and operator of a petroleum underground storage tank are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in the event of noncompliance. Regardless of which party complies, the date set for compliance at a particular facility is determined by the characteristics of the UST owner as set forth in §334.92 of this title (relating to Compliance Dates).

### **§334.92. Compliance Dates.**

Owners of petroleum underground storage tanks are required to comply with the requirements of this subchapter by the following dates:

(1) all petroleum marketing firms owning 1,000 or more USTs within the United States and all other UST owners that report a tangible net worth of \$20 million or more to the United States Securities and Exchange Commission (SEC), Dun and Bradstreet, the Energy Information Administration, or the Rural Electrification Administration; effective date of this subchapter;

(2) all petroleum marketing firms owning 100-999 USTs within the United States; October 26, 1989;

(3) all petroleum marketing firms owning 13-99 USTs at more than one facility within the United States; April 26, 1990;

(4) all petroleum UST owners not described in paragraphs (1), (2), or (3) of this section, including all local government entities; October 26, 1990;

**§334.93. Amount and Scope of Required Financial Responsibility.**

(a) Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following per-occurrence amounts:

(1) for owners or operators of petroleum underground storage tanks that are located at petroleum marketing facilities, or that handle an average of more than 10,000 gallons of petroleum per month based on annual throughput for the previous calendar year; \$1 million;

(2) for all other owners or operators of petroleum underground storage tanks;  
\$500,000.

(b) Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following annual aggregate amounts:

(1) for owners or operators of 1 to 100 petroleum underground storage tanks within the United States, \$1 million; and

(2) for owners or operators of 101 or more petroleum underground storage tanks within the United States, \$2 million.

(c) For the purposes of subsections (b) and (f) of this section only, petroleum underground storage tank means a single containment unit and does not mean combinations of single containment units.

(d) Except as provided in subsection (e) of this section, if the owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for:

(1) taking corrective action;

(2) compensating third parties for bodily injury and property damage caused by sudden accidental releases; or

(3) compensating third parties for bodily injury and property damage caused by nonsudden accidental releases, the amount of assurance provided by each mechanism or combination of mechanisms must be in the full amount specified in subsections (a) and (b) of this section.

(e) If owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for different petroleum underground storage tanks, the annual

aggregate required shall be based on the number of tanks covered by each such separate mechanism or combination of mechanisms.

(f) Owners or operators shall review the amount of aggregate assurance provided whenever additional petroleum underground storage tanks are acquired or installed. If the number of petroleum underground storage tanks within the United States for which assurance must be provided exceeds 100, the owner or operator shall demonstrate financial responsibility in the amount of at least \$2 million of annual aggregate assurance by the anniversary of the date on which the mechanism demonstrating financial responsibility became effective. If assurance is being demonstrated by a combination of mechanisms, the owner or operator shall demonstrate financial responsibility in the amount of at least \$2 million of annual aggregate assurance by the first-occurring effective date anniversary of any one of the mechanisms combined (other than a financial test or guarantee) to provide assurance.

(g) The amounts of assurance required under this section exclude legal defense costs.

(h) The required per-occurrence and annual aggregate coverage amounts do not in any way limit the liability of the owner or operator.

#### **§334.94. Allowable Mechanisms and Combinations of Mechanisms.**

(a) Subject to the limitations of subsections (b) and (c) of this section, an owner or operator may use any one or combination of the mechanisms listed in §§334.95-334.101 of this title (relating to Financial Test of Self-Insurance; Guarantee; Insurance and Risk Retention Group Coverage; Surety Bond; Letter of Credit; Trust Fund; and Standby Trust Fund) to demonstrate financial responsibility under this subchapter for one or more underground storage tanks.

(b) An owner or operator may use a guarantee or surety bond to establish financial responsibility only if the Attorney General of Texas has submitted a written statement to the commission that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in the state.

(c) An owner or operator may use self-insurance in combination with a guarantee only if, for the purpose of meeting the requirements of the financial test under this rule, the financial statements of the owner or operator are not consolidated with the financial statements of the guarantor.

#### **§334.95. Financial Test of Self-Insurance.**

(a) An owner or operator, and/or guarantor, may satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner or operator, and/or guarantor must meet the criteria of subsections (b) or (g) of this section based on year-end financial statements for the latest completed fiscal year.

(b) The owner or operator, and/or guarantor, must have a tangible net worth of at least ten times:

(1) the total of the applicable aggregate amount required by §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility), based on the number of underground storage tanks for which a financial test is used to demonstrate financial responsibility to the commission under this section;

(2) the sum of the corrective action cost estimates, the current closure and post-closure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial responsibility to the commission under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste);

(3) the sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial responsibility to the commission under §331.46 of this title (relating to Plugging and Abandonment).

(c) The owner or operator, and/or guarantor, must have a tangible net worth of at least \$10 million.

(d) The owner or operator, and/or guarantor, must have a letter signed by the chief financial officer worded as specified in subsection (l) of this section.

(e) The owner or operator, and/or guarantor, must either:

(1) file financial statements annually with the United States Securities and Exchange Commission, the Energy Information Administration, or the Rural Electrification Administration; or

(2) report annually the firm's tangible net worth to Dun and Bradstreet, and Dun and Bradstreet must have assigned the firm a financial strength rating of (e)(1) or (k)(l).

(f) The firm's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(g) The owner or operator, and/or guarantor must meet the financial test requirements of 40 CFR 264.147 (f)(1) as adopted by paragraph of §335.152 (a)(6) of this title (relating to Standards), substituting the appropriate amounts specified in §334.93(b)(1) and (2) of this title (relating to Amount and Scope of Required Financial Responsibility) for the "amount of liability coverage" each time specified in that section.

(h) The fiscal year-end financial statements of the owner or operator, and/or guarantor, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination.

(i) The firm's year-end financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(j) The owner or operator, and/or guarantor, must have a letter signed by the chief financial officer, worded as specified in subsection (l) of this section.

(k) If the financial statements of the owner or operator, and/or guarantor, are not submitted annually to the United States Securities and Exchange Commission, the Energy Information Administration or the Rural Electrification Administration, the owner or operator, and/or guarantor, must obtain a special report by an independent certified public accountant stating that:

(1) he has compared the data that the letter from the chief financial officer specifies as having been derived from the latest year-end financial statements of the owner or operator, and/or guarantor, with the amounts in such financial statements; and

(2) in connection with that comparison, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(l) To demonstrate that it meets the financial test under subsection (b) or (g) of this section, the chief financial officer of the owner or operator, and/or guarantor, must sign, within 120 days of the close of each financial reporting year, as defined by the 12-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted.

#### Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator, or guarantor]. This letter is in support of the use of [insert: "the financial test of self-insurance," and/or "guarantee"] to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this [insert: "owner or operator," and/or guarantor"]: [List for each facility: the name and address of the facility where tanks assured by this financial test are located. Alternatively, if the number of tanks which a firm owns or operates in the United States exceeds 20, and all of these tanks are being covered by the same guarantee, state the exact location where the information relating to the number of tanks at each facility and the names and addresses of the facilities where the tanks are located can be found.] If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the registration information submitted pursuant to §334.7 of Title 31, Texas Administrative Code.

A [insert: "financial test," and/or "guarantee"] is also used by this [insert: "owner or operator," or "guarantor"] to demonstrate evidence of financial responsibility in the following amounts under other commission regulations.

	Amount
Texas Water Commission Regulations:	
Closure (§335.152(a)(6) and §335.112(a)(7)) . . . . .	\$_____
Post-Closure Care (§335.152(a)(6) and §335.112(a)(7)) . . . . .	\$_____
Liability Coverage (§335.152(a)(6) and §335.112(a)(7)) . . . . .	\$_____
Corrective Action (§335.167 and §305.401) . . . . .	\$_____
Plugging and Abandonment (§331.46) . . . . .	\$_____

This [insert: "owner or operator," or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on his/her financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of §334.95(b) of Title 31, Texas Administrative Code are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of §334.95(g) of this title (relating to Financial Test of Self-Insurance) are being used to demonstrate compliance with the financial test requirements.]

ALTERNATIVE I

1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee . . . . . \$\_\_\_\_\_
2. Amount of corrective action, closure and post-closure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee . . . . . \$\_\_\_\_\_
3. Sum of lines 1 and 2 . . . . . \$\_\_\_\_\_
4. Total tangible assets . . . . . \$\_\_\_\_\_
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] . . . . . \$\_\_\_\_\_
6. Tangible net worth [subtract line 5 from line 4] . . . . . \$\_\_\_\_\_

Yes No

7. Is line 6 at least \$10 million? . . . . . \_\_\_\_\_
8. Is line 6 at least 10 times line 3? . . . . . \_\_\_\_\_
9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission? . . . . . \_\_\_\_\_
10. Have financial statements for the latest fiscal year been filed with the Energy Information Administration? . . . . . \_\_\_\_\_
11. Have financial statements for the latest fiscal year been filed with

- the Rural Electrification Administration? ..... \_\_\_\_\_
12. Has financial information been provided to Dun and Bradstreet, and has  
Dun and Bradstreet provided a financial strength rating of (e)(1) or  
(k)(1)? [Answer "Yes only if both criteria have been met."] ..... \_\_\_\_\_

ALTERNATIVE II

1. Amount of annual UST aggregate coverage being assured by a financial  
test, and/or guarantee ..... \_\_\_\_\_
2. Amount of corrective action, closure and post-closure care costs,  
liability coverage, and plugging and abandonment costs covered by  
a financial test, and/or guarantee ..... \_\_\_\_\_
3. Sum of lines 1 and 2 ..... \_\_\_\_\_
4. Total tangible assets ..... \_\_\_\_\_
5. Total liabilities [if any of the amount reported on line 3 is included  
in total liabilities, you may deduct that amount from this line and add  
that amount to line 6] ..... \_\_\_\_\_
6. Tangible new worth [subtract line 5 from line 4] ..... \_\_\_\_\_
7. Total assets in the U.S. [required only if less than 90 percent of  
assets are located in the U.S.] ..... \_\_\_\_\_
8. Is line 6 at least \$10 million? ..... \_\_\_\_\_
9. Is line 6 at least 6 times line 3? ..... \_\_\_\_\_
10. Are at least 90 percent of assets located in the U.S.?  
[If "No," complete line 11.] ..... \_\_\_\_\_
11. Is line 7 at least 6 times line 3? ..... \_\_\_\_\_
- [Fill in either lines 12-15 or lines 16-18:]
12. Current assets ..... \_\_\_\_\_
13. Current liabilities ..... \_\_\_\_\_
14. Net working capital [subtract line 13 from 12] ..... \_\_\_\_\_
15. Is line 14 at least 6 times lines 3? ..... \_\_\_\_\_
16. Current bond rating of most recent bond issue ..... \_\_\_\_\_
17. Name of rating service ..... \_\_\_\_\_
18. Date of maturity or bond ..... \_\_\_\_\_
19. Have financial statements from the latest fiscal year been filed  
with the SEC, the Energy Information Administration, or the Rural  
Electrification Administration? ..... \_\_\_\_\_

[If "No," please attach a report from an independent certified public accountant certifying  
that there are no material differences between the data as reported in lines 4-18 above and  
the financial statements for the latest fiscal year.]

[For both Alternative I and Alternative II complete the certification with this statement.]

I hereby certify that the wording of this letter is identical to the wording specified in §334.95 of Title 31, Texas Administrative Code as such regulations were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

[Date]

(m) If an owner or operator using the test to provide financial assurance finds that he or she no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within 150 days of the end of the year for which financial statements have been prepared.

(n) The executive director may require reports of financial condition at any time from the owner or operator, and/or guarantor. If the executive director finds, on the basis of such reports or other information, that the owner or operator, and/or guarantor, no longer meets the financial test requirements of §334.95(b) or (g) and (l) of this title (relating to Financial Test of Self-Insurance), the owner or operator must obtain alternative coverage within 30 days after notification of such a finding.

(o) If the owner or operator fails to obtain alternate assurance within 150 days of finding that he or she no longer meets the requirements of the financial test based on the year-end financial statements, or within 30 days of notification by the executive director that he or she no longer meets the requirements of the financial test, the owner or operator must notify the executive director of such failure within ten days.

#### **§334.96. Guarantee.**

(a) An owner or operator may satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:

(1) a firm that:

(A) possesses a controlling interest in the owner or operator;

(B) possesses a controlling interest in a firm described under subsection subparagraph (A) of this paragraph; or

(C) is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or



(2) a firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.

(b) Within 120 days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of §334.95 of this title (relating to Financial Test of Self-Insurance) based on year-end financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in §334.95(l) of this title (relating to Financial Test of Self-Insurance) and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within 120 days of the end of that financial reporting year the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the executive director notifies the guarantor that he or she no longer meets the requirements of the financial test of §334.95(b) or (g) and (l) of this title (relating to Financial Test of Self-Insurance) the guarantor must notify the owner or operator within ten days of receiving such notification from the executive director. In both cases, the guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternate coverage as specified in §334.108(c) of this title (relating to Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance).

(c) The guarantee must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

#### GUARANTEE

Guarantee made this [date] by [name of guaranteeing entity], a business entity organized under the laws of the state of [name of state], herein referred to as guarantor, to the Texas Water Commission and to any and all third parties, and obligees, on behalf of [owner or operator] of [business address].

#### Recitals

(1) Guarantor meets or exceeds the financial test criteria of §334.95(b) or (g) and (l) of Title 31, Texas Administrative Code and agrees to comply with the requirements for guarantors as specified in §334.96(b) of Title 31, Texas Administrative Code.

(2) [Owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the names(s) and address(es) of the facility(ies) where the tanks are located. Alternatively, if the number of tanks which a firm owns or operates in the United States exceeds 20, and all of these tanks are being covered by the same guarantee, state the exact location where the information relating to the number of tanks at each facility and the names and addresses of the facilities where the tanks are located can be found.] If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted pursuant to §334.7 of Title 31, Texas Administrative Code, and the name and address of the facility.]

This guarantee satisfies Subchapter E of Chapter 334 of Title 31, Texas Administrative Code requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "nonsudden accidental releases" or "accidental release"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.

(3) [Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator); "On behalf of our affiliate" (if guarantor is a related firm of the owner or operator); or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)] [owner or operator], guarantor guarantees to the Texas Water Commission and to any and all third parties that:

In the event that [owner or operator] fails to provide alternate coverage within 60 days after receipt of a notice of cancellation of this guarantee and the Executive Director of the Texas Water Commission has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the Executive Director of the Texas Water Commission, shall fund a standby trust fund in accordance with the provisions of §334.106 of Title 31, Texas Administrative Code, in an amount not to exceed the coverage limits specified above.

In the event that the Executive Director of the Texas Water Commission determines that [owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with Subchapter D of Chapter 334 of Title 31, Texas Administrative Code, the guarantor upon written instructions from the executive director of the Texas Water Commission shall fund a standby trust in accordance with the provisions of §334.106 of Title 31, Texas Administrative Code, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the Executive Director of the Texas Water Commission, shall fund a standby trust in accordance with the provisions of §334.106 of Title 31, Texas Administrative Code to satisfy such judgement(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

(4) Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of §334.95(b) or (g) and (l) of Title 31, Texas Administrative Code, guarantor shall send within 120 days of such failure, by certified mail, notice to [owner or operator]. The guarantee will terminate 120 days from the date of receipt of the notice by [owner or operator], as evidenced by the return receipt.

(5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

(6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to Chapter 334 of Title 31, Texas Administrative Code.

(7) Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial responsibility requirements of Subchapter E of Chapter 334 of Title 31, Texas Administrative Code for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than 120 days after receipt of such notice by [owner or operator], as evidenced by the return receipt.

(8) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily damage or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of §334.93 of Title 31, Texas Administrative Code.

(9) Guarantor expressly waived notice of acceptance of this guarantee by the Texas Water Commission, by any or all third parties, or by [owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection (c) of §334.96 of Title 31, Texas Administrative Code as such regulations were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of Guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

(d) An owner or operator who uses a guarantee to satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §334.106 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §334.101 of this title (relating to Standby Trust Fund).

**§334.97. Insurance and Risk Retention Group Coverage.**

(a) An owner or operator may satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. Such insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.

(b) Each insurance policy must be amended by an endorsement worded as specified in paragraph (1) of this subsection or evidenced by a certificate of insurance worded as specified in paragraph (2) of this subsection, except that instructions in parentheses must be replaced with the relevant information and the parentheses deleted.

(1) Endorsement.

Name: (name of each covered location)

Address: (address of each covered location)

Policy Number:

Period of Coverage: (current policy period)

Name of (Insurer or Risk Retention Group):

Address of (Insurer or Risk Retention Group):

Name of Insured:

Address of Insured:

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

(List the number of tanks at each facility and the names(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted pursuant to Title 30, Texas Administrative Code, §334.7, and the name and address of the facility.)

for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tank(s) identified in this paragraph.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for

each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (policy number). The effective date of said policy is (date).

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subsections (a) through (e) of paragraph 2 are hereby amended to conform with these subsections (a) through (e):

a. Bankruptcy or insolvency of the insured shall not relieve the ("Insurer" or "Group") of its obligations under the policy to which this endorsement is attached.

b. The ("Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any such payment made by the ("Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in Title 30, Texas Administrative Code, §§334.95 through 334.100 (relating to Financial Test of Self-Insurance; Guarantee; Insurance and Risk Retention Group Coverage; Surety Bond; Letter of Credit; and Trust Fund).

c. Whenever requested by the Executive Director of the Texas Natural Resource Conservation Commission, the ("Insurer" or "Group") agrees to furnish to the executive director of the Texas Natural Resource Conservation Commission a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the ("Insurer" or "Group") will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims for any occurrence that commenced during the term of the policy that is discovered and reported to the ("Insurer" or "Group") within six months of the effective date of the cancellation or termination of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in Title 30, Texas Administrative Code, §334.97(b)(1), and that the ("Insurer" or "Group") is ("licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in Texas").

(Signature of authorized representative of Insurer or Risk Retention Group)

(Name of person signing)

(Title of person signing), Authorized Representative of (Name of Insurer or Risk Retention Group)

(Address of Representative)

(2) Certificate of Insurance.

Name: (name of each covered location)

Address: (address of each covered location)

Policy Number:

Endorsement (if applicable):

Period of Coverage: (current policy period)

Name of (Insurer or Risk Retention Group):

Address of (Insurer or Risk Retention Group):

Name of Insured:

Address of Insured:

Certification:

1. (Name of Insurer or Risk Retention Group), (the "Insurer" or "Group"), as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

(List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted pursuant to Title 30, Texas Administrative Code, §334.7, and the name and address of the facility.) for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tank(s) identified above.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of

coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (policy number). The effective date of said policy is (date).

2. The ("Insurer" or "Group") further certifies the following with respect to the insurance described in paragraph (1):

a. Bankruptcy or insolvency of the insured shall not relieve the ("Insurer" or "Group") of its obligations under the policy to which this certificate applies.

b. The ("Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy, to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any such payment made by the ("Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in Title 30, Texas Administrative Code, §§334.95 through 334.100 (relating to Financial Test of Self-Insurance; Guarantee; Insurance and Risk Retention Group Coverage; Surety Bond; Letter of Credit; and Trust Fund).

c. Whenever requested by the Executive Director of the Texas Natural Resource Conservation Commission, the ("Insurer" or "Group") agrees to furnish to the Executive Director of the Texas Natural Resource Conservation Commission a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the ("Insurer" or "Group") will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims for any occurrence that commenced during the term of the policy that is discovered and reported to the ("Insurer" or "Group") within six months of the effective date of the cancellation or termination of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in Title 30, Texas Administrative Code, §334.97(b)(2), and that the ("Insurer" or "Group") is ("licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in Texas").



(Signature of authorized representative of Insurer)

(Type name)

(Title), Authorized Representative of (name of Insurer or Risk Retention Group)

(Address of Representative)

(c) Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or is eligible to provide insurance as an excess or surplus lines insurer in Texas.

Adopted October 11, 1995

Effective November 8, 1995

**§334.98. Surety Bond.**

(a) An owner or operator may satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the United States Department of the Treasury.

(b) The surety bond must be worded as follows, except that instructions in brackets must be replaced with the relevant information and the brackets deleted.

**PERFORMANCE BOND**

Date bond executed: \_\_\_\_\_

Period of coverage: \_\_\_\_\_

Principal: [legal name and business address of owner or operator]

Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation (if applicable): \_\_\_\_\_

Surety(ies): [name(s) and business address(es)]

Scope of Coverage: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted pursuant to §334.7 of title 31, Texas Administrative Code, and the name and address of the facility. List the coverage guaranteed by the bond: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank"].

Penal sums of bond: Per occurrence \$ \_\_\_\_\_  
Annual aggregate \$ \_\_\_\_\_  
Surety's bond number: \_\_\_\_\_

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the Texas Water Commission in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under Subchapter I of Chapter 26, Texas Water Code, as amended, to provide financial assurance for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above; and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully ["take corrective action, in accordance with Subchapter D of Chapter 334 of Title 31, Texas Administrative Code and the Executive Director of the Texas Water Commission's instructions for, "and/or "compensate injured third parties for bodily injury and property damage caused by either "sudden" or "nonsudden" or "sudden and nonsudden"] accidental releases arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in subchapter E of Chapter 334 of Title 31, Texas Administrative Code, within 120 days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of §334.93 of Title 31, Texas Administrative Code.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the Executive Director of the Texas Water Commission that the principal has failed to ["take corrective action, in accordance with subchapter D of Chapter 334 of Title 31, Texas Administrative Code and the Executive Director of the Texas Water Commission's instructions," and/or "compensate injured third parties"] as guaranteed by this bond, the Surety(ies) shall either perform ["corrective action in accordance with subchapter D of Chapter 334 of Title 31, Texas Administrative Code and the Executive Director of the Texas Water Commission's instructions," and/or "third-party liability compensation"] or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the Executive Director of the Texas Water Commission under §334.106 of Title 31, Texas Administrative Code.

Upon notification by the Executive Director of the Texas Water Commission that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the Executive Director of the Texas Water Commission has determined or suspects that a release has occurred, the Surety(ies) suspects that a release occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the Executive Director of the Texas Water Commission under §334.106 of Title 31, Texas Administrative Code.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in §334.98(b) of Title 31, Texas Administrative Code as such regulations were constituted on the date this bond was executed.

**PRINCIPAL**

[Signature(s)]  
[Name(s)]  
[Title(s)]  
[Corporate seal]

**CORPORATE SURETY(IES)**

[Name and address]  
State of Incorporation: \_\_\_\_\_  
Liability limit: \$ \_\_\_\_\_  
[Signature(s)]  
[Name(s) and titles(s)]  
[Corporate seal]  
[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]  
Bond premium: \$ \_\_\_\_\_

(c) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.

(d) The owner or operator who uses a surety bond to satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §334.106 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §334.101 of this title (relating to Standby Trust Fund).

**§334.99. Letter of Credit.**

(a) An owner or operator may satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining an irrevocable standby letter of

credit that conforms to the requirements of this section. The issuing institution must be an entity that has the authority to issue letters of credit in Texas and whose letter-of-credit operations are regulated and examined by a federal or state agency.

(b) The letter of credit must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

#### IRREVOCABLE STANDBY LETTER OF CREDIT

[Name and address of issuing institution]

[Name and address of Executive Director of the Texas Water Commission]

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of [in words] U.S. dollars (\$[insert dollar amount]), available upon presentation of:

(1) your sight draft, bearing reference to this letter of credit, No. \_\_\_\_; and

(2) your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of Subchapter I of Chapter 26, Texas Water Code, as amended".

This letter of credit may be drawn on to cover [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the underground storage tank(s) identified below in the amount of [in words], (\$[insert dollar amount]), per occurrence and [in words], (\$[insert dollar amount]), annual aggregate:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted pursuant to §334.7 of Title 31, Texas Administrative Code, and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of §334.93 of Title 31, Texas Administrative Code.

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended from a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify [owner or operator] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event the [owner or operator] is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by [owner or operator], as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to use, and we shall deposit the amount of the draft directly into the standby trust fund of [owner or operator] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in §334.99(b) of Title 31, Texas Administrative Code as such regulations were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]  
[Date]

This credit is subject to [insert " the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

(c) An owner or operator who uses a letter of credit to satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility) must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the executive director will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the executive director under §334.106 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §334.101 of this title (relating to Standby Trust Fund).

(d) The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit must provide that credit be automatically renewed for the same term as the original term, unless, at least 120 days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the 120 days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

**§334.100. Trust Fund.**

(a) An owner or operator may satisfy the requirements of §334.93 of this title (relating to Amount and Scope of Remedial Financial Responsibility) by establishing a trust fund that conforms to the requirements of this section. The trustee must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Texas.

(b) The wording of the trust agreement must be identical to the wording specified in §334.101(b) of this title (relating to Standby Trust Fund), and must be accompanied by a formal certification of acknowledgement as specified in §334.101(c) of this title (relating to Standby Trust Fund).

(c) The trust fund, when established, must be funded for the full required amount of coverage, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining required coverage.

(d) If the value of the trust fund is greater than the required amount of coverage, the owner or operator may submit a written request to the executive director for release of the excess.

(e) If other financial assurance as specified in this subpart is substituted for all or part of the trust fund, the owner or operator may submit a written request to the executive director for release of the excess.

(f) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsections (d) or (e) of this section, the executive director will instruct the trustee to release to the owner or operator such funds as the executive director specifies in writing.

**§334.101. Standby Trust Fund.**

(a) An owner or operator using any one of the mechanisms authorized by §334.96 of this title (relating to Guarantee), or §334.99 of this title (relating to Letter of Credit) must establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Texas.

(b) The standby trust agreement or trust agreement must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

#### TRUST AGREEMENT

Trust agreement, the "Agreement," entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert "Incorporated in the state of \_\_\_\_\_" or "a national bank"], the "Trustee."

Whereas, the Texas Water Commission has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed or corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached subchapter A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the standby trust agreement;

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee.

Now, therefor, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

(c) The term "Executive Director" means the Executive Director of the Texas Water Commission.

Section 2. Identification of the Financial Assurance Mechanism. This Agreement pertains to the [identify the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments (This paragraph is only applicable to the standby trust agreement.)].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the Texas Water Commission. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. [The Fund is established initially as a standby to receive payments and shall not consist of any property.] Payments made by the provider of



financial assurance pursuant to the Executive Director's instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the Texas Water Commission.

Section 4. Payment for ["Corrective Action" and/or "Third-Party Liability Claims"]. The Trustee shall make payments from the Fund as the Executive Director shall direct, in writing, to provide for the payment of the costs of [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "accidental releases"] arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
- (c) bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of §334.93 of Title 31, Texas Administrative Code.

The Trustee shall reimburse the Grantor, or other persons as specified by the Executive Director, from the Fund for corrective action expenditures and/or third-party liability claims in such amounts as the Executive Director specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(a) Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80A-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;

(b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and

(c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even through, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentally thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 11. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 12. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee and this successor accepts the appointment. The successor Trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor Trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of successor Trustee or for instructions. The successor Trustee shall specify the date on which it assumes administration of the

trust in writing sent to the Grantor and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Executive Director, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Executive Director hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the Executive Director, except as provided for herein.

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and the Executive Director if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the Executive Director, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 16. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Executive Director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 17. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the state of Texas, or the Comptroller of the Currency in the case of National Association banks.

Section 18. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in §334.101(b) of Title 31, Texas Administrative Code as such regulations were constituted on the date written above.

[Signature of Grantor]  
[Name of the Grantor]  
[Title]

Attest:

[Signature of Trustee]  
[Name of the Trustee]  
[Title]  
[Seal]

Attest:

[Signature of Witness]  
[Name of Witness]  
[Title]  
[Seal]

(c) The standby trust agreement or trust agreement must be accompanied by formal certification of acknowledgement similar to the following:

State of \_\_\_\_\_  
County of \_\_\_\_\_

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]  
[Name of Notary Public]

(d) The executive director will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the executive director determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.

(e) An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this rule.

**§334.102. Substitution of Financial Assurance Mechanisms by Owner or Operator.**

(a) An owner or operator may substitute any alternate financial assurance mechanisms as specified in this subchapter provided that at all times he or she maintains an effective financial assurance mechanism or combination of mechanisms that satisfies the requirements of §334.93 of this title (relating to Amount and Scope of Required Financial Responsibility).

(b) After obtaining alternate financial assurance as specified in this subchapter, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance.

**§334.103. Cancellation or Nonrenewal by a Provider of Financial Assurance.**

(a) Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator.

(b) Termination of a guarantee, a surety bond, or a letter of credit may not occur until 120 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(c) Termination of insurance, risk retention group coverage, or state-funded assurance may not occur until 60 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(d) If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in §334.104 of this title (relating to Reporting by Owner or Operator), the owner or operator must obtain alternate coverage as specified in this section within 60 days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within 60 days after receipt of the notice of termination, the owner or operator must notify the executive director of such failure and submit:

- (1) the name and address of the provider of financial assurance;
- (2) the effective date of termination; and
- (3) the evidence of the financial assurance mechanism subject to the termination maintained in accordance with §334.105(b) of this title (relating to Financial Assurance Recordkeeping).

**§334.104. Reporting by Owner or Operator.**

(a) An owner or operator must submit the appropriate forms listed in §334.105(b) of this title (relating to Financial Assurance Recordkeeping) documenting current evidence of financial responsibility to the executive director:

(1) within 30 days after the owner or operator identifies a release from an underground storage tank required to be reported under Subchapter D of this chapter (relating to Release Reporting and Correction Action), unless on file with the commission;

(2) if the owner or operator fails to obtain alternate coverage as required by this subchapter, within 30 days after the owner or operator receives notice of:

(A) commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming a provider of financial assurance as a debtor;

(B) suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;

(C) failure of a guarantor to meet the requirements of the financial test;

(D) other incapacity of a provider of financial assurance; or

(3) as required by §334.95(o) of this title (relating to Financial Test of Self Insurance) and §334.103(d) of this title (relating to Cancellation of Nonrenewal by a Provider of Financial Assurance).

(b) An owner or operator must certify compliance with the financial responsibility requirements of this subchapter as specified in the new tank registration form when notifying the executive director of the installation of a new underground storage tank.

(c) Upon request of the executive director, an owner or operator must submit evidence of financial assurance as described in §334.105(b) of this title (relating to Financial Assurance Recordkeeping) or other information relevant to compliance with this subchapter.

**§334.105. Financial Assurance Recordkeeping.**

(a) Owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this subchapter for an underground storage tank until released from the requirements of this subchapter under §334.107 of this title (relating to Release from the Requirements). An owner or operator must maintain such evidence at the underground storage tank site or the owner's or operator's place of business. Records maintained off-site must be made available upon request of the executive director.

(b) An owner or operator must maintain the following types of evidence of financial responsibility.

(1) An owner or operator using an assurance mechanism specified in §§334.95- 334.99 of this title (relating to Financial Test of Self-Insurance, Guarantee, Insurance and Risk Retention Group Coverage, Surety Bond, and Letter of Credit) or §334.100 of this title (relating to Trust Fund) must maintain a copy of the instrument worded as specified.

(2) An owner or operator using a financial test or guarantee must maintain a copy of the chief financial officer's letter based on year-end financial statements for the most recent completed financial reporting year. Such evidence must be on file no later than 120 days after the close of the financial reporting year.

(3) An owner or operator using a guarantee, surety bond, or letter of credit must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

(4) An owner or operator using an insurance policy or risk retention group coverage must maintain a copy of the signed insurance policy or risk retention group coverage policy, with the endorsement or certificate of insurance and any amendments to the agreements.

(5) An owner or operator using an assurance mechanism specified in §§334.95- 334.100 of this title (relating to Financial Test of Self-Insurance, Guarantee, Insurance and Risk Retention Group Coverage, Surety Bond, Letter of Credit, and Trust Fund) must maintain an updated copy of a certification of financial responsibility worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

#### CERTIFICATION OF FINANCIAL RESPONSIBILITY

[Owner or operator] hereby certifies that it is in compliance with the requirements of subchapter E of Chapter 334 of Title 31, Texas Administrative Code.

The financial assurance mechanism[s] used to demonstrate financial responsibility under Subchapter E of Chapter 334 of Title 31, Texas Administrative Code is[are] as follows:

[For each mechanism, list the type of mechanism, name of issuer, mechanism number (if applicable), amount of coverage, effective period of coverage and whether the mechanism covers "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases."]



[Signature of owner or operator]  
[Name of owner or operator]  
[Title]  
[Date]  
[Signature of witness or notary]  
[Name of witness or notary]  
[Date]

(c) The owner or operator must update this certification whenever the financial assurance mechanism(s) used to demonstrate financial responsibility change(s).

**§334.106. Drawing on Financial Assurance Mechanisms.**

(a) The executive director shall require the guarantor, surety, or institution issuing a letter of credit to place the amount of funds stipulated by the executive director, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:

(1) the owner or operator fails to establish alternate financial assurance within 60 days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or, as applicable, other financial assurance mechanism; and

(2) the executive director determines or suspects that a release from an underground storage tank covered by the mechanism has occurred and so notifies the owner or operator or the owner or operator has notified the executive director pursuant to Subchapter D of this chapter (relating to Release Reporting and Corrective Action) of a release from an underground storage tank covered by the mechanism; or

(3) the conditions of subsections (b)(1) or (b)(2)(A) or (b)(2)(B) of this section are satisfied.

(b) The executive director may draw on a standby trust fund when:

(1) the executive director makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under Subchapter D of this chapter (relating to Release Reporting and Corrective Action); or

(2) the executive director has received either:

(A) certification from the owner or operator and the third-party liability claimant(s) and from attorneys representing the owner or operator and the third-party liability claimant(s) that the a third-party liability claim should be paid. The certification must be worded as

follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

#### CERTIFICATION OF VALID CLAIM

The undersigned, as principals and as legal representatives of [insert owner or operator] and [insert name and address of third-party claimant], hereby certify that the claim of bodily injury [and/or] property damage caused by an accidental release arising from operating [owner's or operator's] underground storage tank should be paid in the amount of \$[\_\_\_\_\_].

[Signatures]

Owner or Operator

Attorney for Owner or Operator

[Signature(s)]

Claimant(s)

Attorney(s) for Claimant(s)

(Notary)

Date

(Notary)

Date

; or

(B) a valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an underground storage tank covered by financial assurance under this subchapter and the executive director determines that the owner or operator has not satisfied the judgment.

(c) If the executive director determines that the amount of corrective action costs and third-party liability claims eligible for payment under subsection (b) of this section may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The executive director shall pay third-party liability claims in the order in which the executive director receives certifications under subsection (b)(2)(A) of this section and valid court orders under subsection (b)(2)(B) of this section.

#### **§334.107. Release from the Requirements.**

An owner or operator is no longer required to maintain financial responsibility under this subchapter for an underground storage tank after the tank has been properly closed or, if corrective action is required, after corrective action has been completed and the tank has been properly closed in accordance with the requirements of this chapter.

#### **§334.108. Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance.**

(a) Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming an owner or operator debtor, the owner or operator must

notify the executive director by certified mail of such commencement and submit the appropriate forms listed in subsection §334.105 of this title (relating to Financial Assurance Recordkeeping) documenting current financial responsibility.

(b) Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming a guarantor providing financial assurance as debtor, such guarantor must notify the owner or operator by certified mail of such commencement as required under §334.96 of this title (relating to Guarantee).

(c) An owner or operator who obtains financial assurance by a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, letter of credit, or state-required mechanism. The owner or operator must obtain alternate financial assurance as specified in this subchapter within 30 days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within 30 days after such notification, he or she must notify the executive director.

#### **§334.109. Replenishment of Guarantees, Letters of Credit, or Surety Bonds.**

(a) If at any time after a standby trust is funded upon the instruction of the executive director with funds drawn from a guarantee, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn:

(1) replenish the value of financial assurance to equal the full amount of coverage required; or

(2) acquire another financial assurance mechanism for the amount by which funds in the standby trust have been reduced.

(b) For purposes of this section, the full amount of coverage required is the amount of coverage specified in §334.93 of this title (Relating to Amount and Scope of Required Financial Responsibility). If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.

#### **§334.110. Corrective Action Deductibles.**

(a) The Petroleum Storage Tank Remediation Fund can be used to satisfy financial responsibility requirements for corrective action if owners and operators meet the criteria for eligibility in §334.310 of this title (relating to Requirements for Eligibility). Owners or operators of petroleum underground storage tanks that rely on the Petroleum Storage Tank Remediation Fund for financial assurance requirements must also demonstrate, through the use of allowable mechanisms as provided in

§334.94 of this title (relating to Allowable Mechanisms and Combinations of Mechanisms), the first dollar expenses for taking corrective action caused by accidental releases arising from the operation of petroleum underground storage tanks. For the purposes of this section, the first dollar expenses shall be the amount required by the following provisions.

(1) Except as provided in paragraphs (2), (3), (4), and (5) of this subsection, the owner or operator shall demonstrate financial assurance for the first expenses for corrective action taken for each occurrence as follows:

(A) a person who owns or operates 1,000 or more single petroleum storage tanks, the first \$10,000;

(B) a person who owns or operates not fewer than 100 or more than 999 single petroleum storage tanks, the first \$5,000;

(C) a person who owns or operates not fewer than 13 or more than 99 single petroleum storage tanks, the first \$2,500; and

(D) a person who owns or operates fewer than 13 single petroleum storage tanks, the first \$1,000.

(2) If an owner or operator does not submit a site assessment in accordance with §334.78 of this title (relating to Site Assessment) before December 23, 1996, the owner or operator shall demonstrate financial assurance for the first expenses for corrective action taken for each occurrence as follows:

(A) a person who owns or operates 1,000 or more single petroleum storage tanks, the first \$20,000;

(B) a person who owns or operates not fewer than 100 or more than 999 single petroleum storage tanks, the first \$10,000;

(C) a person who owns or operates not fewer than 13 or more than 99 single petroleum storage tanks, the first \$5,000; and

(D) a person who owns or operates fewer than 13 single petroleum storage tanks, the first \$2,000.

(3) If an owner or operator's corrective action plan as required in §334.81 of this title (relating to Corrective Action Plan) is not approved by the commission before December 23, 1997, the owner or operator shall demonstrate financial assurance for the first expenses for corrective action taken for each occurrence as follows:

(A) a person who owns or operates 1,000 or more single petroleum storage tanks, the first \$40,000;

(B) a person who owns or operates not fewer than 100 or more than 999 single petroleum storage tanks, the first \$20,000;

(C) a person who owns or operates not fewer than 13 or more than 99 single petroleum storage tanks, the first \$10,000; and

(D) a person who owns or operates fewer than 13 single petroleum storage tanks, the first \$4,000.

(4) If an owner or operator does not have a corrective action plan submitted in accordance with §334.81 of this title (relating to Corrective Action Plan) approved by the commission on December 23, 1998, and has not met the goals specified in the plan by that date, the owner or operator shall demonstrate financial assurance for the first expenses for corrective action taken for each occurrence as follows:

(A) a person who owns or operates 1,000 or more single petroleum storage tanks, the first \$80,000;

(B) a person who owns or operates not fewer than 100 or more than 999 single petroleum storage tanks, the first \$40,000;

(C) a person who owns or operates not fewer than 13 or more than 99 single petroleum storage tanks, the first \$20,000; and

(D) a person who owns or operates fewer than 13 single petroleum storage tanks, the first \$8,000.

(5) The owner or operator of a site for which a closure letter has been issued shall demonstrate the first \$50,000 of expenses for corrective action for each subsequent release occurrence.

(b) In the event that more than one of the provisions in subsection (a) of this section are applicable for the determination of the first dollar expenses for corrective action on a particular release occurrence, the owner or operator shall demonstrate financial assurance for the greater of the applicable amounts.

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Addition of (New): §334.110  
Amendment to: §334.97  
Date Adopted: October 11, 1995  
Date Filed with the Secretary of State: October 18, 1995  
Date Effective: November 8, 1995